



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

**By Electronic Mail and First Class Mail**  
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Cleta Mitchell, Esq.  
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3000 K Street, N.W., Suite 600  
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RE: MUR 6449  
Jon Bruning  
Friends of Jon Bruning and Douglas  
R. Ayer, in his official capacity  
as treasurer (terminated)  
Jon Bruning Exploratory Committee  
Bruning for Senate, Inc. f/k/a  
Bruning 2012 Exploratory  
Committee and Douglas R. Ayer,  
in his official capacity as treasurer

Dear Ms. Mitchell:

On January 7, 2011, the Federal Election Commission (the "Commission") notified your above-listed clients of a complaint alleging that they violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and provided them with a copy of the complaint. On June 14, 2011, the Commission notified you of an amendment to the complaint and provided you with a copy of that amendment.

After reviewing the allegations contained in the complaint, your responses, and publicly available information, the Commission on January 10, 2013, found reason to believe that Jon Bruning violated 2 U.S.C. § 432(e)(1) and 11 C.F.R. § 101.1(a) and that Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory Committee and Douglas R. Ayer in his official capacity as treasurer ("2012 Committee") violated 2 U.S.C. §§ 433(a), 434(a) and 434(b). Also on that date, the Commission dismissed the allegation that Jon Bruning Exploratory Committee violated 2 U.S.C. §§ 433(a) and 434(a), found no reason to believe that the 2012 Committee violated 2 U.S.C. § 441a(f), and found no reason to believe that Friends of Jon Bruning and Douglas R. Ayer in his official capacity as treasurer (terminated) violated the Act. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determinations.

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MUR 6449  
Cleta Mitchell, Esq.  
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Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519. In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

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We look forward to your response.

On behalf of the Commission,

A handwritten signature in black ink, appearing to read "Ellen L. Weintraub".

Ellen L. Weintraub  
Chair

Enclosures  
Factual and Legal Analysis

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2  
3 **RESPONDENTS:** Jon Bruning MUR 6449  
4 Bruning for Senate, Inc. f/k/a Bruning 2012  
5 Exploratory Committee and Douglas R. Ayer  
6 in his official capacity as treasurer  
7 John Bruning Exploratory Committee  
8 Friends of Jon Bruning and Douglas R. Ayer  
9 in his official capacity as treasurer (terminated)  
10

11 **FACTUAL AND LEGAL ANALYSIS**

12  
13 **I. INTRODUCTION**

14 This matter was generated by a complaint filed with the Federal Election Commission by  
15 Laura Wigley, Nebraska Democratic Party, alleging violations of the Federal Election Campaign  
16 Act of 1971, as amended (the "Act"), by Respondents.

17 **II. FACTUAL AND LEGAL ANALYSIS**

18 **A. Background**

19 The Complaint alleges that Jon Bruning, a candidate for the United States Senate from  
20 Nebraska in 2012, violated the Act when he triggered candidate reporting requirements in  
21 November 2010 but failed to timely file a Statement of Candidacy with the Commission to  
22 designate his principal campaign committee.<sup>1</sup> The Complaint further alleges that Bruning's  
23 committee failed to timely file a Statement of Organization and to timely disclose receipts and  
24 disbursements.

25 After Bruning registered as a candidate in January 2011 and his committee, Bruning for  
26 Senate, Inc., ("Bruning 2012")<sup>2</sup> filed its first disclosure report in April 2011, complainant filed

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<sup>1</sup> Bruning lost the May 15, 2012, primary election for United States Senate.

<sup>2</sup> The Bruning 2012 Exploratory Committee, the committee the Commission originally notified, became Jon Bruning for Senate, Inc., on January 3, 2011, when it filed its Statement of Organization as Bruning's principal campaign committee. Consequently, the Commission makes determinations as to Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory Committee and Douglas R. Ayer in his official capacity as treasurer.

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1 an Amendment to the Complaint. The Amendment alleged additional violations related to funds  
2 received from the Jon Bruning Exploratory Committee ("JBEC"). JBEC is an unregistered entity  
3 that held funds raised by Bruning's unsuccessful 2008 campaign for Nebraska's other Senate  
4 seat. The Amendment alleges that, as a result of the transfer from JBEC, Bruning 2012 may  
5 have received excessive contributions from contributors to Bruning's 2008 campaign and that  
6 not all of the 2008 campaign funds are accounted for. It further alleges that JBEC was required  
7 to register and report as a political committee, but has failed to do so.<sup>3</sup>

8 Respondents deny both sets of allegations. They contend Bruning did not become a  
9 candidate in November 2010, but instead was "testing the waters" for the 2012 election at that  
10 time. They contend he became a candidate only upon timely filing his Statement of Candidacy  
11 on January 6, 2011, and that Bruning 2012 timely filed its Statement of Organization on the same  
12 day.<sup>4</sup> Finally, Respondents deny that JBEC had to register as a political committee and deny that  
13 Bruning 2012 knowingly accepted contributions in excess of the Act's limitations. Therefore,  
14 Respondents ask that the Commission dismiss the allegations.<sup>5</sup>

15 Based on the available information, the Commission finds reason to believe that Jon  
16 Bruning failed to timely file his Statement of Candidacy and designate his principal campaign  
17 committee and that Bruning 2012 failed to timely file a Statement of Organization and to

<sup>3</sup> The Complaint also alleges that Respondents failed to disclose their activity to the IRS. *See* Compl. at 1-2, 9-10. This Report will address only the potential violations of the Act, as the Commission has no jurisdiction over IRS matters.

<sup>4</sup> Respondents' filings were postmarked January 3, 2011, which serves as the filing date. *See* 2 U.S.C. § 434(a)(5). The Commission will refer to the January 3 date in this Report.

<sup>5</sup> The "Response and Motion to Dismiss Complaint" was filed on behalf of Bruning's 2008 committee, Friends of Jon Bruning, but the other Respondents subsequently adopted it in its entirety. *See* Letter from Cleta Mitchell, Counsel, Bruning 2012 *et al.*, to Jeff S. Jordan, Supervisory Attorney, FEC (Mar. 11, 2011). The response to the Amendment to the Complaint, filed with the Commission on July 18, 2011, was also filed on behalf of all Respondents. The fact that the initial response is styled as a motion to dismiss does not require any additional procedural steps for the Commission.

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1 disclose in full the receipts and disbursements associated with the campaign's testing the waters  
2 activity. The Commission dismisses the allegation as to JBEC, finds no reason to believe that  
3 Bruning 2012 knowingly accepted excessive contributions, and finds no reason to believe that  
4 Bruning 2008 violated the Act.

5 **B. Factual Summary**

6 Jon Bruning was a candidate for the United States Senate from Nebraska in both 2008  
7 and 2012. Bruning registered his 2008 principal campaign committee, Friends of Jon Bruning  
8 ("Bruning 2008"), with the Commission. On November 19, 2007, Bruning withdrew from the  
9 2008 election. Jon Bruning Aff. ¶ 3 (Feb. 21, 2011). On December 31, 2007, Bruning 2008  
10 transferred its remaining funds, \$677,251.49, to JBEC, which Respondents describe as a  
11 "'testing the waters' account for a possible future federal election." See Bruning 2008 Year End  
12 Report for 2007 at 75; Bruning Aff. ¶¶ 8-9, 14. On January 27, 2008, Bruning 2008 filed its  
13 2007 Year End Report as a termination report with the Commission, stating that its residual  
14 funds totaling \$677,251.49 were "transferred to an exploratory committee for a future election."  
15 See Resp., Ex. 7, Letter from Douglas Ayer, Treasurer, Friends of Jon Bruning, to Travis Brown,  
16 Reports Analysis Division ("RAD"), FEC (Jan. 28, 2008). JBEC, the recipient of these funds,  
17 has never registered with the Commission and never filed any disclosure reports. It exists solely  
18 as the name by which Bruning designated the financial account that would hold the funds from  
19 his terminated 2008 campaign for exploratory activities related to any subsequent campaign.

20 On November 5, 2010, according to Respondents, Bruning initiated "testing the waters"  
21 activities for the 2012 United States Senate election and Respondents opened a separate "2012  
22 Exploratory Account" for testing the waters. Resp. at 5; Bruning Aff. ¶ 16; Mark Pedersen Aff.

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¶ 26 (Feb. 21, 2011) ("Feb. 2011 Pedersen Aff.").<sup>6</sup> Also on that date, JBEC transferred \$448,349.52 to the 2012 Exploratory Account. JBEC transferred an additional \$162,313.51 to the 2012 Exploratory Account on December 17, 2010. *See* 2011 April Quarterly Report of Bruning 2012 at 251.

On January 3, 2011, Bruning filed a Statement of Candidacy with the Secretary of the Senate for the 2012 Senate election, designating Bruning 2012 as his principal campaign committee. Also on that date, Bruning 2012 filed a Statement of Organization with the Secretary of the Senate. *See Resp., Exs. 11-12.* On April 15, 2011, Bruning 2012 filed its first disclosure report, the 2011 April Quarterly Report, disclosing its activity for November 2010 through March 2011, including its receipt of the November and December 2010 transfers from JBEC.

The Complaint cites press coverage concerning Bruning that commenced on November 5, 2010, and alleges that Bruning was not "testing the waters" but rather was already acting as a candidate for the 2012 Senate election. Compl. at 7-9, Exs. B-H (Dec. 30, 2010). For example, Bruning was quoted in a published article that day, "I want to run. I'm ready to run." Compl., Ex. D. Also included in the Complaint is a November 30, 2010, e-mail solicitation from Bruning stating, "Please help me defeat Ben Nelson in 2012 by making a contribution today." Compl., Ex. I.

## C. Legal Analysis

### 1. Legal Standards Applicable in "Testing the Waters" Matters

An individual is deemed to be a "candidate" for purposes of the Act if he or she receives contributions or makes expenditures in excess of \$5,000. 2 U.S.C. § 431(2). Once an individual meets the \$5,000 threshold, he or she has fifteen days to designate a principal campaign

<sup>6</sup> Pedersen served as assistant treasurer of Bruning 2008 and serves as assistant treasurer of Bruning 2012.

1 committee by filing a Statement of Candidacy. 2 U.S.C. § 432(e)(1); 11 C.F.R. § 101.1(a).

2 The principal campaign committee must then file a Statement of Organization within 10 days of  
3 its designation, *see* 2 U.S.C. § 433(a), and must file disclosure reports with the Commission in  
4 accordance with 2 U.S.C. §§ 434(a) and (b).

5 The Commission has established limited exemptions from these thresholds, which permit  
6 an individual to test the feasibility of a campaign for federal office without becoming a candidate  
7 under the Act. Commonly referred to as the "testing the waters" exemptions, 11 C.F.R.  
8 §§ 100.72 and 100.131 respectively exclude from the definitions of "contribution" and  
9 "expenditure" those funds received, and payments made, to determine whether an individual  
10 should become a candidate.<sup>7</sup> *See* 2 U.S.C. § 431(8), (9). "Testing the waters" activities include,  
11 but are not limited to, payments for polling, telephone calls, and travel. 11 C.F.R.  
12 §§ 100.72(a), 100.131(a). An individual who is "testing the waters" need not register or file  
13 disclosure reports with the Commission unless and until the individual subsequently decides to  
14 run for federal office *or* conducts activities that indicate he or she has decided to become a  
15 candidate. *See id.*; *see also* Advisory Op. 1979-26 (Grassley). All funds raised and spent for  
16 "testing the waters" activities are, however, subject to the Act's limitations and prohibitions.  
17 11 C.F.R. §§ 100.72(a), 100.131(a).

18 Once an individual begins to campaign or decides to become a candidate, funds that were  
19 raised or spent to "test the waters" apply to the \$5,000 threshold for qualifying as a candidate.  
20 11 C.F.R. §§ 100.72(a), 100.131(a). Certain activities may indicate that the individual has

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<sup>7</sup> The Commission has emphasized the narrow scope of these exemptions to the Act's disclosure requirements. *See* Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) ("The Commission has, therefore, amended the rules to ensure that the 'testing the waters' exemptions will not be extended beyond their original purpose. Specifically, these provisions are intended to be limited exemptions from the reporting requirements of the Act . . .").



1 decided to become a candidate and is no longer "testing the waters." In that case, once the  
2 individual has raised or spent more than \$5,000, he or she must register as a candidate.  
3 Commission regulations set out five non-exhaustive factors to be considered in determining  
4 whether an individual has decided to become a candidate. An individual indicates that he or she  
5 has gone beyond "testing the waters" and has decided to become a candidate, for example, by  
6 (1) using general public political advertising to publicize his or her intention to campaign for  
7 federal office; (2) raising funds in excess of what could reasonably be expected to be used for  
8 exploratory activities or undertaking activity designed to amass campaign funds that would be  
9 spent after he or she becomes a candidate; (3) making or authorizing written or oral statements  
10 that refer to him or her as a candidate for a particular office; (4) conducting activities in close  
11 proximity to the election or over a protracted period of time; or (5) taking action to qualify for  
12 the ballot under state law. 11 C.F.R. §§ 100.72(b), 100.131(b). These regulations seek to draw a  
13 distinction between activities directed to an evaluation of the feasibility of one's candidacy, as  
14 distinguished from conduct signifying that a private decision to become a candidate has been  
15 made. *See* Advisory Op. 1981-32 (Askew).

16           2.     Jon Bruning and Bruning 2012 Did Not Timely Register and Report

17           The Complaint alleges that Bruning triggered candidate reporting requirements no later  
18 than November 5, 2010, based on "his statements and actions" but failed to timely file a  
19 Statement of Candidacy with the Commission to designate his principal campaign committee.  
20 Compl. at 7-8. The Complaint further alleges that Bruning's 2012 committee failed to timely file  
21 a Statement of Organization and to timely disclose receipts and disbursements. *Id.* at 9.

22           In determining whether an individual has moved from "testing the waters" to candidacy,  
23 the Commission has considered whether the individual has engaged in activities or made

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1 statements that would indicate that he or she has decided to run for federal office.<sup>8</sup> Once an  
2 individual engages in these activities, he or she is a “candidate” under the Act, and the “testing  
3 the waters” exemption is no longer available. In this matter, available information indicates that  
4 Bruning made public statements and conducted activities during November 2010 that indicated  
5 that he had decided to run as of that time and should have registered with the Commission as  
6 required by the Act.

7 The Complaint attaches news articles dating back to approximately 60 days before  
8 Bruning registered as a candidate. In an article published on November 5, 2010 — the first day  
9 of Bruning’s purported “testing the waters” activities and the day JBEC transferred \$448,349.52  
10 to “Bruning 2012 Exploratory Committee” — Bruning was quoted, “I want to run. I’m ready to  
11 run” and “I can’t imagine any conditions under which I would not run.” Compl., Ex. D, Don  
12 Walton, *Bruning Says He’s Actively Exploring a Senate Campaign*, LINCOLN J. STAR, Nov. 5,  
13 2010.<sup>9</sup> Bruning also reportedly declared that while he bowed out of the 2008 Senate race at the  
14 request of then-President George W. Bush, “that’s not going to happen again. I’m not asking  
15 permission. I’m not asking for a blessing.” *Id.* Bruning is further quoted that he welcomes “a  
16 spirited primary” contest for the Republican nomination. *Id.* In another article, Bruning  
17 reportedly stated that he still had more than \$600,000 in federal campaign funds from his

<sup>8</sup> See, e.g., MUR 5693 (Aronson) (Commission found probable cause to believe that individual became a candidate when he sent a solicitation letter that included statements such as “But I have the energy, the experience, and the determination to win this race. And as evidenced by the attached news article, I am ready to begin fighting for our future . . . now”; “Every dollar we receive in the next few weeks can help us prepare for this fight against [incumbent] Scott Garrett”; and “We have come a long way in just a few short weeks. And with your support, we can go the distance.”). But see MUR 5934 (Thompson) (Commission failed, by a vote of 2-4, to find reason to believe, and then voted to dismiss allegations, that Thompson became a candidate by making statements such as “I can’t remember exactly the point that I said, ‘I’m going to do this,’ but when I did, the thing that occurred to me ‘I’m going to tell people that I am thinking about it and see what kind of reaction I get to it,’” and was quoted as saying that he was “testing the waters” about a run, “but the waters feel pretty warm to me” and “You’re either running or not running. I think the steps we’ve taken are pretty obvious”).

<sup>9</sup> [http://journalstar.com/news/local/govt-and-politics/article\\_88d3e204-e8f9-11df-805e-001cc4c002e0.html](http://journalstar.com/news/local/govt-and-politics/article_88d3e204-e8f9-11df-805e-001cc4c002e0.html).

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1 previous run and that he had hired four campaign workers. Compl., Ex. C, Paul Hammel, *Senate*  
2 *Interest for Bruning, Stenberg*, OMAHA WORLD-HERALD, Nov. 6, 2010.<sup>10</sup> Bruning reportedly  
3 also stated that his announcement only three days after his reelection as Nebraska Attorney  
4 General was not meant to scare off other potential candidates. *Id.*<sup>11</sup>

5 After Bruning's reported statements suggesting that he had made the decision to run for  
6 Senate — "I want to run. I'm ready to run," and "I'm not asking permission." — he made a  
7 more definitive statement on November 15, 2010, when he tweeted "Nebraska State Treasurer  
8 Shane Osborne to chair our campaign." Compl., Ex. J. Finally, in a November 30, 2010,  
9 solicitation e-mail, Bruning stated, "Please help me defeat Ben Nelson in 2012 by making a  
10 contribution today. Together we can take back this country and bring true Nebraska values to  
11 Washington." Compl., Ex. I.

12 That November 30, 2010, solicitation demonstrates that Bruning had by that time  
13 concluded he would run. By soliciting funds to be used to campaign against a specifically  
14 named opponent, Bruning made or authorized a statement that refers to himself as a candidate for  
15 a particular office, and thus certainly by this point he was no longer merely evaluating the  
16 viability of his candidacy but had decided to campaign for office. See 11 C.F.R.  
17 §§ 100.72(b)(3), 100.131(b)(3). Bruning's message is comparable to the solicitation letter at  
18 issue in MUR 5693 (Annsohn), where the Commission found probable cause to believe that the  
19 candidate was no longer "testing the waters" after sending a solicitation letter including a

<sup>10</sup> <http://www.omaha.com/article/20101106/NEWS01/711069870/202>.

<sup>11</sup> Two other press articles from early November 2010 included in the Complaint report that Bruning had declared his candidacy. See Compl., Ex. F, *Treasurer-elect Don Stenberg Ponders Senate Race*, LINCOLN J. STAR, Nov. 8, 2010 ("Attorney General Jon Bruning announced last week he will seek the Republican nomination for the Senate seat."); Ex. G, Robynn Tysver, *GOP Poll Finds Nelson Vulnerable, Viable*, OMAHA WORLD-HERALD, Nov. 9, 2010 ("So far, only Bruning has declared his candidacy."). Neither of these articles contains quoted statements from Bruning.

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1 statement that “[e]very dollar we receive in the next few weeks can help us prepare for this fight  
2 against [incumbent] Scott Garrett.” *Cf.* Advisory Op. 1981-32 (Askew) (the “testing the waters”  
3 exemption “becomes inapplicable once the public activities of the individual take on a partisan  
4 political quality which would indicate that a decision has been made to seek nomination for  
5 election, or election, to a Federal office;” conduct of this type “is distinguished from continuing  
6 to deliberate whether one should actually seek election Federal office.”). Although Bruning’s  
7 solicitation was sent under the email letterhead of the 2012 Exploratory Committee, the text of  
8 the email indicates that Bruning had decided to run. *See* MUR 5693 (Aronsohn) (the use of the  
9 word “exploratory” in communications that otherwise evidence candidate status does not prevent  
10 the application of the Act’s requirements that the candidate register and report with the  
11 Commission).

12 Respondents assert that Bruning was “testing the waters” for the 2012 election as of  
13 November 5, 2010, and only later, “[o]ver the 2010 holidays, [he] made the final decision to seek  
14 the United States Senate seat from Nebraska . . . .” *Resp.* at 5 (Feb. 22, 2011); *Bruning Aff.*  
15 ¶¶ 16-17. Thus, Respondents contend that when Bruning filed his Statement of Candidacy on  
16 January 3, 2011, and his principal campaign committee filed its Statement of Organization on the  
17 same day, both were timely. *Resp.* at 5-6. Respondents do not, however, describe their “testing  
18 the waters” activities. Nor do they address the allegations in the Complaint regarding public  
19 statements that indicate Bruning had decided he would be a candidate or the fact that the funds  
20 amassed by the Committee were in excess of what would be required to test the waters.

21 Relying on Bruning’s November 30, 2010, solicitation to collect funds to defeat the  
22 incumbent, Senator Ben Nelson, as the latest date that Bruning became a candidate for the 2012  
23 election, he was required to designate a principal campaign committee by filing a Statement of

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1 Candidacy with the Commission within fifteen days, or by December 15, 2010, at the latest.<sup>12</sup>

2 See 2 U.S.C. § 432(e)(1); 11 C.F.R. § 101.1(a). Bruning's principal campaign committee was

3 then required to file a Statement of Organization within ten days of its designation, or by

4 December 25, 2010, at the latest, see 2 U.S.C. § 433(a), and to file its 2010 Year-End disclosure

5 report with the Commission, in accordance with 2 U.S.C. § 434(a), by January 31, 2011.

6 Bruning did not file his Statement of Candidacy with the Commission until January 3, 2011, and

7 Bruning 2012 did not file its first disclosure report, the 2011 April Quarterly, until April 15,

8 2011.<sup>13</sup> Accordingly, the Commission finds reason to believe that Jon Bruning violated 2 U.S.C.

9 § 432(e)(1) and 11 C.F.R. § 101.1(a) and that Bruning for Senate, Inc. f/k/a Bruning 2012

10 Exploratory Committee and Douglas R. Ayer in his official capacity as treasurer violated

11 2 U.S.C. §§ 433(a) and 434(a).<sup>14</sup>

<sup>12</sup> The complaint also alleged that funds raised by the Bruning 2012 Exploratory Committee, including the \$610,663.03 transferred from the Bruning 2008 campaign, are in excess of what would be required to conduct "testing the waters" activities, and were instead intended to be used by Bruning's 2012 campaign. Compl. at 7. The Commission concludes that Bruning moved from "testing the waters" into candidate status no later than November 30, 2010, based on his public statements and, therefore, the Commission need not reach these facts.

<sup>13</sup> The Commission notes that this matter is distinguishable from other matters, which were dismissed by the Commission where a candidate failed to timely file a statement of candidacy for longer periods of time. See, e.g., MUR 6282 (Friends of John Lee Smith) (EPS dismissal where statement of candidacy filed more than 30 days late); MUR 6374 (Roly Arrojo for Congress) (EPS dismissal where statement of candidacy filed 60 days late). However, these prior matters either did not result in the candidate missing the filing of a scheduled report (Smith), or else involved a missing report that contained little financial activity (Arrojo). Bruning's failure to timely file his statement of candidacy resulted in the failure of Bruning 2012 to file its 2010 Year-End report at all and to omit over \$850,000 in activity. Accordingly, the Commission concludes that the violations in this matter are material and thus not suited to dismissal as a matter of prosecutorial discretion.

<sup>14</sup> Respondents assert that because the Commission did not object to Bruning 2008's transfer of its excess campaign funds to JBEC at the time of the December 31, 2007, transfer, the Commission is now estopped from penalizing Respondents for "inadvertent or technical errors." Resp. at 8-9. The response does not specify what potential "errors" the Commission is assertedly estopped from penalizing. Respondents themselves acknowledge that "the general rule is that equitable estoppel is not applicable against the government regardless of the actions of its agents." *Id.* at 8. Respondents argue that this matter merits an exception to the rule, citing *Tokonogy v. United States*, 417 F. Supp. 78 (S.D.N.Y. 1976). In that case, the IRS sent a letter to a taxpayer requesting a payment "as soon as possible" and suggesting the possibility of alternative arrangements, but subsequently informed the taxpayer, who had been in the hospital, that he was in default. By contrast, the Commission never offered Respondents any assurance regarding their actions. Rather, as noted below, RAD advised Bruning to seek an Advisory Opinion on the subject of redesignations of Bruning 2008 general election contributions to JBEC.

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3. Bruning 2012 Should Have Disclosed All of Bruning's Testing the Waters Activity, Including JBEC's Activity

The Amendment to the Complaint alleges that JBEC was required to disclose its contributions and expenditures when it triggered political committee status by transferring \$448,349.52 to Bruning's 2012 Senate campaign on November 5, 2010. Amend. Compl. at 3, 5-6. Respondents state that JBEC was "established in December, 2007 as a testing the waters account, authorized by Mr. Bruning for the purpose of exploring a possible future federal candidacy," and that "testing the waters" accounts are not obligated to register and report until the candidate determines that he or she is a federal candidate. Resp. at 6; Amend. Resp. at 1-2 (July 18, 2011).

Respondents are correct, up to a point. After an individual reaches candidate status, however, all reportable amounts from the beginning of the "testing the waters" period must be filed with the first financial disclosure report filed by the candidate's committee, even if the funds were received or expended prior to the current reporting period. See 11 C.F.R. §§ 100.72(a), 100.131(a), 101.3, 104.3(a)-(b).

Accordingly, regardless of when Bruning became a candidate for the 2012 election, his principal campaign committee, Bruning 2012, should have disclosed all of the testing the waters activity — which here would include the activity of Bruning's other exploratory account, JBEC — on its first disclosure report, the 2011 April Quarterly, rather than solely the transfers that JBEC made to the 2012 Exploratory Account on November 5, 2010, and December 17, 2010. Authorized committees are required to disclose, *inter alia*, dividends and interest received and contribution refunds disbursed, as well as all transactions in which they engaged. See 2 U.S.C.

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Nonetheless, to the extent Respondents assert that the Commission is estopped from penalizing Respondents for Bruning 2008's transfer to JBEC, the Commission does not analyze whether the \$677,251 transfer was itself a violation of the Act.

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1 § 434(b)(2)(J), (b)(4)(F). Respondents here characterize JBEC as an exploratory, testing the  
2 waters account, Resp. at 3; Bruning Aff. ¶¶ 8-9; like the 2012 Exploratory Account, it is a named  
3 financial account indistinguishable from Bruning 2012, the recipient of the funds, after Bruning  
4 became a candidate. See 11 C.F.R. §§ 100.72(a), 100.131(a). Accordingly, all transactions from  
5 both exploratory accounts should have been disclosed, not merely the transfer of funds from the  
6 first account to the Bruning 2012 account opened later. As such, Bruning 2012 should have  
7 disclosed these transactions for JBEC as well as Bruning 2012 when it disclosed testing the  
8 waters activity after Bruning became a candidate. See 2 U.S.C. § 434(b); 11 C.F.R.  
9 §§ 100.72(a), 100.131(a), 101.3, 104.3(a)-(b).

10 In view of Bruning 2012's responsibility to disclose JBEC's activity, there is reason to  
11 believe that Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory Committee and Douglas R.  
12 Ayer in his official capacity as treasurer violated 2 U.S.C. § 434(b) by failing to disclose JBEC's  
13 activity on its 2011 April Quarterly Report. In light of this finding, the Commission dismisses  
14 the allegation that the Jon Bruning Exploratory Committee failed to register and report as a  
15 political committee in violation of 2 U.S.C. §§ 433(a) and 434(a).

16 4. The Bruning 2008 Contributions Transferred  
17 to Bruning 2012  
18

19 The Amendment to the Complaint alleges that JBEC likely accepted excessive  
20 contributions from contributors whose contributions to Bruning 2008 were transferred to  
21 Bruning 2012 through JBEC. Amend. Compl. at 3-4, 6-7. Respondents deny the allegation.  
22 The available information indicates that Bruning 2012 did not accept excessive contributions in  
23 this manner.

a. 2008 Primary Election Contributions

The Act limits the amount of contributions by individuals to authorized committees of a candidate to \$2,300 per election in the 2008 cycle and \$2,500 per election in the 2012 cycle, and no political committee may knowingly accept contributions in excess of these limits. 2 U.S.C. §§ 441a(a)(1)(A), 441a(f). The Amendment to the Complaint alleges that Bruning 2012, on its 2011 April Quarterly Report, failed to identify the Bruning 2008 contributors whose funds comprised the \$448,349.52 transfer from JBEC on November 5, 2010, and that Bruning 2012 thereby may have received excessive contributions from these contributors if they subsequently donated to Bruning 2012 for the primary and general elections. Amend. Compl. at 3. Respondents state that these funds are comprised of contributions for Bruning's 2008 primary election plus interest earned on the funds while in the JBEC account.<sup>15</sup> July 2011 Pedersen Aff. ¶ 22.

The available information does not indicate that the November 5 transfer resulted in Respondents accepting excessive contributions. Respondents state, based on a sworn affidavit, that they monitored the 2008 donors' contributions transferred to Bruning 2012 "to ensure that any donor who made contributions during the 2008 cycle do [*sic*] not make contributions in the aggregate which exceed \$2500 for the 2012 primary and \$2500 for the 2012 general election." Amend. Resp. at 2; *see also* July 2011 Pedersen Aff. ¶¶ 30-31. Other available information tends to confirm this assertion. For example, in March 2011, Bruning 2012 refunded \$2,300 to each of two contributors, Peggy Sokol and David Sokol, the amount of their contributions to Bruning 2008 for the general election, which were itemized in JBEC's transfer to Bruning 2012, after they each made the maximum \$2,500 contributions to Bruning 2012 on March 2, 2011.

<sup>15</sup> Bruning 2012's disclosure report describes the receipt from JBEC as "Transfer of Surplus Funds-No Donor Item[ization]." Bruning 2012 April 2011 Quarterly Report at 251.

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1 Under the circumstances, there is no reason to believe that Respondents accepted excessive  
2 contributions with respect to the November 5 transfer.<sup>16</sup>

3 b. 2008 General Election Contributions

4 The Amendment to the Complaint states that Bruning 2012, on its 2011 April Quarterly  
5 Report, properly itemized the \$162,100 transfer from JBEC on December 17, 2010. Amend.  
6 Compl. at 3 n.4. Respondents state that these funds are comprised of contributions for Bruning's  
7 2008 general election which were redesignated by the donors to JBEC, plus accrued interest  
8 from November and December 2010.<sup>17</sup> July 2011 Pedersen Aff. ¶ 23. The available information  
9 does not suggest that Bruning 2012 has received excessive contributions as a result of its receipt  
10 of the Bruning 2008 general election contributions, but as noted below, the redesignations to  
11 JBEC present a novel issue.

12 Bruning ended his 2008 campaign in November 2007 and thus did not participate in the  
13 2008 general election. Under the Commission's regulations, if a candidate does not participate  
14 in the general election, any contributions made for the general election shall be refunded to the  
15 contributors, redesignated, or reattributed in accordance with the Commission's regulations.  
16 11 C.F.R. § 102.9(e)(3). Treasurers of authorized committees may request a written  
17 redesignation of a contribution by the contributor for a different election if certain conditions are  
18 met. 11 C.F.R. § 110.1(b)(5). According to RAD's communication log, Bruning asked if he  
19 could keep the money he received for the 2008 general election despite dropping out of the race.

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<sup>16</sup> As explained in Footnote 14 above, the Commission is not analyzing the legality of the November 5 transfer under the Act in this instance. Nor is the Commission opining here on whether the Act would have required aggregation of the 2008 and 2012 contributions.

<sup>17</sup> Bruning 2012 itemized contributions from 71 individuals on its 2011 April Quarterly Report at 252-75. Also on December 17, 2010, Bruning 2012 received an unitemized \$213.51 transfer from JBEC, which may be the accrued interest.

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1 The RAD Analyst told Bruning that typically such money needed to be refunded, but that  
2 Bruning's idea of redesignating the funds to a future election by holding it in an exploratory  
3 committee would have to be explored via an Advisory Opinion. RAD Communication Log,  
4 Dec. 11, 2007.<sup>18</sup> According to Respondents, Bruning asked the 2008 general election  
5 contributors in writing to redesignate their contributions to JBEC "for a future election" and  
6 advised contributors that they could in the alternative receive a refund. Resp. at 3, Ex. 14  
7 (sample redesignation request); Bruning Aff. ¶ 10; Feb. 2011 Pedersen Aff. ¶ 12. On December  
8 31, 2007, Bruning 2008's transfer of \$677,251.49 to JBEC consisted partly of 2008 general  
9 election contributions "from donors who had not yet requested refunds . . . and others who had  
10 redesignated their contributions to the Bruning Exploratory Account." Feb. 2011 Pedersen Aff.  
11 ¶ 17.

12 The available information does not indicate that Respondents have accepted excessive  
13 contributions by virtue of the December 17 transfer. As explained above, Respondents state that  
14 they voluntarily monitored the 2008 contributions transferred to Bruning 2012 to make sure they  
15 were not excessive when aggregated with 2012 contributions, and submitted a sworn affidavit to  
16 support this assertion, which is also supported by other evidence.<sup>19</sup>

17 Accordingly, there is no reason to believe that Bruning for Senate, Inc. f/k/a Bruning  
18 2012 Exploratory Committee and Douglas R. Ayer in his official capacity as treasurer violated  
19 2 U.S.C. § 441a(f). Finally, because Friends of Jon Bruning, his 2008 campaign committee

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<sup>18</sup> Bruning avers that he "spoke repeatedly to the FEC analyst assigned to [his] campaign in 2007 and also sought expert legal advice in 2007 and 2008 to make certain [he] was doing everything according to the FEC regulations." Bruning Aff. ¶ 21.

<sup>19</sup> As explained in Footnote 14 above, the Commission is not analyzing the legality of the December 17 transfer under the Act in this instance.

- 1 which terminated in 2008, does not appear to have violated any provision of the Act, there is no
- 2 reason to believe that Friends of Jon Bruning violated the Act.

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